

THE
LAW REPORTER.

Vol. 3.]

NOVEMBER, 1840.

[No. 7.]

DEATH BY POISON.

TRIAL OF ELIZA NORTON.—CASE OF MADAME LAFFARGE.

THE frequent occurrence of death by poison, and of the administering of this drug where by timely medical aid a fatal result has been prevented; the ease of procuring and administering it; the secrecy with which it may be mingled with articles of food, and the supposed difficulty of detecting and convicting the offender, because of the incredulity of jurors to the proofs advanced, seem to endanger the security of human life to a degree hitherto unexampled, and to weaken the defences of society where most it is vulnerable. Among the numerous cases which have recently occurred, our attention has been called to those named above, and we propose to give a brief and popular synopsis of them, rather than detailed reports.

Mrs Eliza Norton, of Monson, Mass., was indicted for the murder of James P. Stanton, on the fifth of November, 1839, by administering to him arsenic, of which he died. Her case was submitted to a jury in June. They were unable to agree on a verdict. A second jury was empannelled in September, and after a very minute and thorough examination of the evidence, they, too, could not agree. The prisoner was thereupon by force of a provision of the Revised Statutes, ch. 136, sec. 30, discharged on her own recognizance, which may be deemed equivalent to a release from the prosecution.

It is understood, that the first jury were equally divided, and that the second stood ten for conviction and two for acquittal. The case presented all the proof, which, in offences of this kind, can be expected; and if the evidence thus aggregated is not enough to satisfy the requirements of law or the doubts of a jury, it becomes a very important inquiry, what may be done for the protection of human life? In this case all the witnesses were of unimpeachable character, and no attempt was made to impair the fair weight of their testimony. It was proved beyond the possibility of doubt, that the deceased died by the poison of arsenic. Dr Charles T. Jackson, of Boston, made an analysis of the contents of the stomach, and by a series of most beau-

tiful experiments, detected, reproduced, and exhibited to the jury the arsenic in its metallic form ; and by calculation, determined that the quantity of arsenic remaining in the stomach after death, and of course not including the quantity taken and thrown off by the violent vomiting and purging—or the quantity absorbed into the circulation of the system, was twentythree grains. The whole quantity taken by the deceased, must, therefore, have been much larger and not less than one hundred and fifty or one hundred grains. This was a fact of great moment in determining the question, whether it was taken by design or accident.

Again, it was most abundantly evident that the death was not suicide. No such point was raised in the defence, and none such could with the slightest propriety have been maintained. The deceased was a young man in the high enjoyment of life ; with all his hopes of happiness in full bloom. He had just before engaged to be married to a worthy and estimable young woman ; had purchased a dwelling house and appurtenances, and the last act of his life was to sign the papers, which completed the contract. His dying expressions confirmed the other evidence of his strong and natural attachment to life.

The prisoner purchased arsenic at two several times, once in person, when she procured eighty or one hundred grains, and once, when she sent her son, a lad of fourteen or fifteen years old, who obtained and delivered her two hundred and twenty grains. It was, also, uncontradicted, that the arsenic, of which he, Stanton, died, was administered in some article of food or drink, after his return from his shop on Saturday night, when he complained of being unwell ; and that all the articles which he took, whether of medicine or nourishment, were administered to him by the prisoner. The poison being thus proved to have been procured by the prisoner, and by her administered to Stanton whereby he died, the only possible defence was, that the giving it to him was by accident or mistake, and not by design ; and accordingly the counsel for the prisoner assumed this line of defence.

It became important, therefore, to ascertain in what article of food or medicine the arsenic was mixed. The only conceivable mode of furnishing satisfaction on this point was to trace the consequences, that followed from any particular substance that was swallowed by the patient, because it is a well established fact, about which the learned medical men concurred in judgment, that vomiting especially, and certain other symptoms would, within thirty or forty minutes immediately follow a dose of arsenic. It was proved incontestably, that the deceased, when he returned home on Saturday night, took a cup of fern tea, prepared by the prisoner, and that the symptoms, to be expected from arsenic did immediately follow. Indeed, these vomitings were so violent, that a great part of the contents of the stomach were thrown off, and the patient was apparently on Sunday relieved, and getting well. On Monday morning he was attended by a physician,

and in the evening a soda powder as prepared with an effervescent salt which remained quiet in his stomach, was given by the physician, who, after witnessing its effects, left the patient in the full belief he was getting well. An hour after this, the prisoner mixed and administered another soda powder, which had been left by the physician, when all the effects of arsenic were immediately developed, and the unfortunate man expired in twenty-six hours afterwards.

It was thereupon contended by the attorney general, that arsenic was administered twice—once on Saturday in the fern tea, and once on Monday, in the second soda powder; and it was submitted by him as a point of law to the court, that it being proved that the prisoner procured arsenic and administered it twice with her own hand, the mistake or accident, if there was one, was under these circumstances to be proved affirmatively by the prisoner. But the court held, that this rule did not apply, until it was proved affirmatively by the government, that the arsenic was intentionally administered. It is probably owing to this direction of the court, that there was no verdict. Intention can only be proved by acts. It is always easy to suggest accident or mistake, and especially so in cases of murder by poison. If, therefore, the procuring and administering of it twice is not so far proof of intention that it shall be deemed conclusive until rebutted by evidence on the part of the prisoner to some extent, it is difficult to perceive how the perpetrator of a murder by poison can ever be brought to punishment. The case might be different where there was no proof that a prisoner had procured the poison. But when that fact is established, the prisoner must know how the article was disposed of, and may be presumed able to give evidence directly or circumstantially of the manner of disposing of it, and the means by which it was accidentally mingled with the diet of the deceased. In the present case, no person in the house knew that the prisoner had possessed herself of any arsenic except her son, who procured for her the second parcel; and no person at any time ever saw any, or the traces of any in form in or about the premises.

The statement of the prisoner was this: On Wednesday she procured arsenic for the purpose of killing rats, with which the house was infested. This parcel she disposed of in two ways: part she spread on bread and butter, and deposited in a particular part of the cellar, and the residue she mixed with some dry meal in a cup, which cup she put on the upper shelf of a closet in the kitchen. This was the first parcel. To account for procuring the second parcel, she said that the whole of the first parcel had been consumed by the rats, and on Saturday she procured some more by her son, which second quantity she used in the same way. She professed her entire ignorance of the way in which it *did* get into the stomach of Stanton, but suggested that the cup might have been upset in the closet, and the arsenic it contained might have fallen into the tin vessel, hanging on a nail in the same closet, in which she afterwards made the fern tea, without observing that any thing was in the vessel, or that by the up-

setting of the cup, the arsenic might have been sprinkled on some rice in the closet, with which she made some gruel. Or that she might have possibly taken the cup, in which she put the arsenic from the shelf, to deposit the soda powders in it which were left by the doctor, and thereby it was possible the deceased might have taken the arsenic which caused his death.

This statement of the defence opened a very wide field both of fact and argument. First, as to the motive which induced her to procure any arsenic. In point of fact, it was shown by all the testimony in the case, that in the spring of the year the house had been greatly infested by rats. But the prisoner moved into it in April, subsequently to which and before the purchase of arsenic, the only injury actually experienced was, that one piece of meat, some weeks previous, had been gnawed, as was supposed, by these vermin, and one basket containing grapes, but not the grapes, had probably been injured in the same way. On the other hand, the family residing in the other part of the house, and occupying one side of the common cellar, had not been disturbed at all. Again, it was contended, that the reason given for a second purchase of arsenic could not be true. This, it was alleged by the prisoner, was obtained to kill rats, because they had consumed all that was first procured. It was argued by the attorney general, that if the rats had eaten the first parcel there was no need of obtaining any more, as it would have accomplished the purpose of destroying them. That at any rate, there was no need of getting it so soon as the succeeding Saturday. That it would have been more natural to wait the result of the experiment, and certainly most remarkable to make a new one without some fresh disturbance by the vermin, of which not the least proof was given. It was strongly pressed upon the jury, that any false declaration as to the motive for procuring the drug at several times, or the mode of using it, was conclusive evidence of a felonious intention. That arsenic had been procured by the prisoner and passed into the stomach, of the deceased was in proof by unquestionable testimony, but any innocent mode of using it or disposing it, rested entirely on her uncorroborated and simple declaration, and if this declaration was in any part false, the whole defence resting upon it must fail. Again, it was in evidence, that nobody in the family knew that the first quantity of arsenic had been obtained, and nobody but the boy knew of procuring the second; and nobody knew of the actual attempt to poison the rats, a circumstance that threw suspicion on the whole statement.

It was not suggested, that the arsenic said to have been spread on bread and butter and deposited in the cellar, would by any possible accident have been taken by Stanton, and of course if the drug was used as the prisoner pretended, the fatal dose or doses were part of the contents of the cup in the closet of the kitchen. The idea that the tin cup hung upon a nail on the shelf under the one upon which the cup containing the arsenic was placed, and thereby, the contents of the one being spilled, might have fallen into the other, was examined with

great care. On one side the possibility of accident was denied from the position of these vessels, but the other circumstances rendered the supposition very extravagant. The arsenic was mingled in the cup, as the prisoner said, with meal, and by no probability could such a mixture prepared for rats be in a less proportion than one grain of arsenic to ten grains of meal. Now twentythree grains of arsenic were by the post mortem examination presumed to have remained after death, and as a part of the quantity taken was vomited or passed off by the medicine, and some certainly absorbed into the system, it is a reasonable conclusion that the deceased swallowed more than fifty grains; so that the quantity of material spilled from one cup to the other must have been five hundred grains of the mixture of arsenic and meal, the color of which mixture would be obvious at first sight to any body using the tea cup, if it was possible that by accident so much could have got into it.

In regard to the rice, it was not supposed on the part of the prosecution, that any arsenic was given with it, not only because the effects of taking arsenic did not distinctly manifest themselves on the patient taking the gruel—if in fact, he did take any—but because if the rice had been poisoned, the family would have been poisoned also, for they ate of it at dinner; but no complaint was made by any person in the house.

The explanation in regard to the soda water was peculiarly unsatisfactory, and hardly within the compass of possibility. That the prisoner should have searched on the back part of the upper shelf of the closet, the place where she had put the cup containing arsenic and meal, for a vessel to hold the soda powders, instead of taking the cups, saucers, tumblers, bowls, or plates that were at hand in common use would not prove accident, but design. But it was yet more wonderful, that when the doctor mixed and administered the soda powders, the drink was grateful to the patient, and sat quietly on his stomach, and when the prisoner in the same tumbler prepared the beverage it was immediately rejected with all the symptoms of violent poison.

At the first trial it was understood that the jury were divided in consequence of doubts as to the existence of any motive on the part of the prisoner. More thorough investigation upon that point was made, and a more extended argument was addressed to the jury on the last trial, by the attorney general.

The prisoner, it was in evidence, was but the nominal keeper of a boarding house. She had not credit enough to hire a house, or purchase the provisions. These were obtained on the credit of the deceased; and for her superintendence he allowed her two dollars per week for each boarder, deducting what the rent and other expenses amounted to. It was not supposed that she expected to marry the deceased, nor was the exact manner of their intercourse ascertained, although a degree of intimacy was proved to have been occasionally noticed, and the deceased reproved for it by his brother. The de-

ceased paid attentions to a young lady in the neighborhood. It was generally rumored that he was engaged to be married to her, and the fact of the engagement was proved on the second trial by the testimony of the young lady herself. The prisoner indulged on all occasions in very disparaging remarks on this young lady, evincing a hostile feeling towards her, as one encroaching upon her own prerogatives, and she treated Stanton in a very discourteous manner at several times when he was about to visit, or was supposed to have been visiting her. It was understood before his death, and at the trial proved to have been the intention of the deceased, to purchase a house; marry Miss Bond, and remove his boarders to the new residence as soon as practicable; and the prisoner once was heard to say he would do it if he could in a fortnight. On Tuesday he purchased the house. The fact was communicated to her at noon of that day, and the next morning she purchased the first quantity of arsenic. On the evening of the same day she prepared a water bath for his feet, whether with or without herb tea, did not appear. He refused to use it. On Thursday she prepared more water, which he refused. On Saturday she obtained more arsenic, and on Saturday evening, without any solicitation on his part, or even knowledge of her intention, she prepared another water bath which she prevailed on him to use, and at that time, with no reason for administering the herb tea which did not exist before, prepared and gave him the tea, which most certainly did contain the arsenic that caused his death. It was thereupon argued by the attorney general, that it was reasonable to conclude, that fern tea was prepared as often as the water bath. That the two preparations of this tea, which he did not drink, contained an infusion of arsenic, as the one did which he did drink. That such infusion exhausted the first quantity purchased. More being procured on Saturday, the half of it was mixed with his fern tea that evening, and when on Sunday and Monday it was found he was recovering from its effects, the residue was mingled with his soda powders on Monday night, and *the deed done*. And that the motive for this deliberate and persevering malignity was the derangement of her household establishment, and possibly the injury to her feelings, on his determination to form a matrimonial connection and remove his boarders from her family.

But she tended him in his sickness with the tenderness of a parent. She wept over his suffering. She mingled kisses of kindness at the moment of his fatal agony. This was said to be inconsistent with human nature—with a felonious purpose—with depravity of heart. But the heart is exceedingly deceptive, and human nature not easily decyphered. The conduct of a person meditating murder, is no more to be measured by reason, than the actions of a maniac. In this respect, however, this case is not very dissimilar to one recently tried in France, of which the following statement may not be uninteresting:—

“Since the commencement of the present year, Parisian society has been very much excited by a charge of murder alleged against a

young woman moving in the higher classes, who is charged with having poisoned her husband, M. Laffarge. This young lady, Marie Capelle, is the daughter of an officer of superior rank, and the niece of M. Garst, governor of the Bank of France, and her position, of course, led every one to doubt that such a crime as that alleged to her charge could have been committed by her; but the charge having been raised, and the evidence adduced sufficient to induce her committal for trial, other facts were brought to the remembrance of her former acquaintance, which led to suspicion that she had been guilty of acts of pilfering; among others, an old friend and companion, the Viscountess Leosand, had lost a *parure* in diamonds, and having had cause to suspect her quondam friend, she caused her to be prosecuted, and after a trial, which lasted several days, she has been found guilty, sentenced to two years imprisonment, to the restitution of the diamonds or their value. When the judgment of the court was communicated to her, it would seem she became greatly affected, and fainted away, and continued suffering very considerably, but we have heard nothing to confirm the report of suicide, or even of apoplexy, which had likewise been spread about. But the most melancholy scene is to follow, when she will be tried for the murder of her husband, by poison. Unfortunately these crimes are so common in France, that it requires all the excitement which rank can give to draw them from the mere common place of a routine case. Madame Laffarge, having been married last year, accompanied her husband to Brive, where he had some iron-works which he directed himself. Having been there for some time, she addressed him a letter, in which she assured him she loved another; that if not adulterous in fact, she was so in feeling and affection, and that she would become so as soon as the distance which separated her from her real or imaginary lover could be passed; he treated this letter as the effect of some momentary excitement, and remonstrated with her upon the character of its language, in the hope that he would be able to bring her back to the sentiments of propriety which he had given her credit for, and this he had appeared to effect. She admitted the impropriety of having written such a letter, the basis of which she stated to have been untrue, became more closely allied, in appearance, to his family, and more attached to himself. Towards the end of last year he had occasion, on account of his commercial affairs, to leave his manufactory and proceed to Paris; while there, for the *Jour des Rois* (Twelfth day), she sent him a cake, made by her own hands, as she states, in a very affectionate letter, adding that she had forwarded another to her sister, and kept one also for herself, and pointing out the precise moment at which she wished him to eat his, as at that moment she would eat hers, and that though separated by a distance of many leagues, they would mentally be united in the same banquet. Laffarge did so, and was soon after seized with dreadful vomitings. However, far from suspecting his wife of such a fiend-like act, he imagined either that the cake had become spoiled on its journey, or that he had imprudently

eaten too large a quantity, and therefore sought the ordinary remedies, which had the effect of restoring to health, though leaving him in a state of weakness. As soon as he was able to travel he returned home to seek his fatal nurse, for if what has appeared by the "instruction" can be relied upon, it would seem that from the moment of his return she had watched over him, tended him in sickness, in his sufferings, in his last agonies, with kindness, solicitude, and all the affection of a devoted wife; whilst every cup which she presented to him was drugged with arsenic.

"And supposing she is found guilty of this crime, do you imagine that she will be condemned to death? No! the jury, in its discretion, will find extenuating circumstances, and she will be condemned to the galleys, from which regard for her innocent and highly respectable family, will preserve her."

Since the above was in type, we learn from foreign papers, that Madame Laffarge has had her trial at the Assizes of Tulle. It appeared, that M. Laffarge had been well educated, was an owner of iron works, and devoted his whole attention to them. In 1839, he lost his first wife; and he sought a second, with whom he might get money to enable him to carry on his speculations. His friends not being able to find him a wife, he applied to a marriage broker who introduced him to Marie Capelle, who had about £1,600 fortune, with about £40 a year. They were married; she was brought to the country, and no sooner arrived there than she shut herself up in her room, and wrote to her husband as follows:

CHARLES—I crave pardon of you on my knees. I have deceived you. I do not love you. I love another. I esteem you. But let me die. I love another also called Charles, handsome, noble. We have long loved. Last year another woman deprived me of his heart. I thought I should have died. For despite I resolved to marry, and, ignorant of the mysteries of marriage, accepted your hand. I thought a kiss on my forehead would have contented you, and that you would have been to me as a father. Comprehend, then, what I have suffered these three days. I respect you, but habits and character have put an abyss between us. Instead of the sweet words of love, trivial kindness, bursts of affection, nothing but those sensual feelings which actuate you, disgust me! Him that I love I saw at Orleans, since our marriage. He has repented. He hid himself at Uzerche. I shall be an adúlteress despite of me. Let me depart. Get me horses, disguise, I will hasten off to Smyrna. I will live by my hands, or by giving lessons. Oh! throw my cloak on one of your precipices, and give me arsenic. I cannot give you my affection, but you may take my life; your caresses are odious to me. I have swallowed poison, but too little; tried to shoot myself but was afraid. Save me from myself, &c.

The trial was very long and affords striking evidence of the earnestness with which French chemists pursue their researches into judicial chemistry. A series of experiments were made by M. Orfila of a most remarkable character.

On the last day of the trial the accused being sufficiently recovered to attend the court, was conveyed there in a chair. She appeared dreadfully ill, but was calm and collected. After a short discussion between M. Orfila, the last who examined the body, and M. Dubois, who deposed, in the first instance, that there was no arsenic, but who gave way to M. Orfila's experiments, the advocate general summed up the case for the prosecution, persisting in the act of accusation against the prisoner. In consequence of her fatigue, an adjournment took place to the evening, when her counsel, M. Paillet, in the midst of profound silence, commenced her defence. He told the history of her life, and quoted letters from the Marquis of Mornay, Deputy of the Oise, and son in law of Marshal Soult; from the Viscountess Montesquieu; the Countess de Valence, mother-in-law of Marshal Gerard; from Marshal Gerard himself, and other letters from persons of distinction, to establish the morality and uniform good conduct of Madame Laffarge from childhood upwards. A despatch from Tulle, which reached Paris late on Monday afternoon, announced that the jury, having brought in a verdict of guilty, with extenuating circumstances, against Madame Laffarge, she was sentenced to hard labor for life, and to be exposed on the pillory. When the verdict was announced, the accused fainted away. An appeal was taken, and this trial, like that for stealing the diamonds, is to be gone over again.

Of course, this trial has caused much excitement in France, and different opinions are entertained in regard to the guilt of the accused. By some, the experiments of M. Orfila are severely condemned, as being too minute and fine spun, and it is said that there is no more reason to believe that M. Laffarge was poisoned, than that his family are striving to get rid of his widow, for reasons by no means creditable, and by artifices most base and revolting. By others, the most extraordinary part of this affair is the nature of the verdict. Madame Laffarge is found "*Guilty, with extenuating circumstances.*" If guilty, where were these circumstances of extenuation? If she murdered her husband, she did so with all the refinement of cruelty—with all the consummation of hypocrisy. If she was a murderess at all, she was so under the most monstrous aggravation of guilt. Never was a criminal so criminal as this woman, if her husband was really poisoned, and poisoned by her hand. What a mockery of human justice, then, is such a verdict! It can only have been what the French call a *transaction de conscience*. The jury would not condemn her to death, because they had still a doubt, perhaps, as to her guilt; but they would not put into practice that merciful axiom of the law which declares that the prisoner is to have the benefit of a doubt. If she is guilty, she is guilty with all the deepest shades of guilt, and no other sentence than that of death should have been recorded; for although it is true that the aversion to capital punishment in France frequently allows the worst criminals to escape the last judgment of human vengeance, it is also true that persons not half so guilty as Madame Laffarge, if she is guilty, are from time to time sent to the guillotine.

RECENT AMERICAN DECISIONS.

*Circuit Court of the United States, Massachusetts, May Term, 1840,
at Boston.*

THE SCHOONER MARION—GRINNELL, CLAIMANT.

In Massachusetts there is no statute law which gives a lien *in rem* to shipwrights and others for building, equipping or repairing ships.

But by the common law a lien exists for repairs and work done on a ship *while she is held in possession*. But if the possession remain in the owner during the repairs, or after they are made the shipwright voluntarily yields up the possession, his lien can not be enforced.

It is of no consequence how a maritime lien arises under the local law. When its existence is established, the jurisdiction of the admiralty attaches to it *proprio vigore*.

Under the facts and circumstances of this case, it was held, that a lien attached, by the common law, for materials furnished, and repairs made, upon the vessel, and that it had not been divested by a voluntary surrender of the vessel to the owner.

LIBEL for repairs and materials for the schooner Marion, and work and labor done on her in the port of New Bedford, to which port the schooner belonged, in October and November, 1839, amounting in the whole to the sum of \$221 49. There was no dispute about the amount due for the repairs, work and material. But when the repairs were undertaken, one Goodwin was the owner, and subsequently transferred the schooner during the time of the repairs to the claimant, Grinnell. The answer insisted, that the libellant, (McFarlin) had no lien on the schooner for the repairs; but that the same were a personal charge only against the owner. The original bill was jointly filed by McFarlin and one Spooner, who asserted a distinct and independent claim for painting done by him on the schooner, amounting to the sum of \$100. But on an exception being taken in the district court, that these distinct and independent claims could not in the admiralty be joined in one libel, it was agreed between the parties, that the libel should be severed, and that each libellant should proceed separately for his own claim. At the district court, a decree was recovered in favor of the libellant (McFarlin,) for the sum of \$221 49; and from that decree an appeal was taken to this court by the claimant.

The cause was at this term argued by

G. T. Curtis for the claimant, and by

Brigham for the libellant.

On the part of the libellant, it was admitted, that, by the general maritime law, shipwrights and material men had no lien upon a *domestic* ship for repairs or supplies; but it was contended, that, by the local law of Massachusetts, the shipwright had a lien so long as he kept possession of the ship, and that such lien could be enforced in the admiralty. In the case at bar, the claimant had the ship in his possession, and he could no more be compelled to abandon that possession without being first paid, than the tailor, or the shoemaker, would be re-

quired to surrender any article which they had made or repaired, without being first paid.

Upon the question of lien, the counsel cited 7 Peters's Rep. 324 ; *The General Smith*, (4 Wheaton 438.) ; *The Nestor*, (1 Sum. 73,) ; 3 Kent's Com. 169 ; Story on Bailments, 287 ; Montague on Lien ; Abbot on Shipping 108.

Upon the point of the jurisdiction of the admiralty, the counsel cited *The Robert Fulton*, (1 Paine, 620;) *Harper v. A New Brig*, (Gilpin's D. C. R. 539 ;) and *Davis v. A New Brig*, (id. 482.)

For the claimant, it was admitted, that the court had full jurisdiction of the matter, and that the only question was, whether the libellant had a lien by the local law of Massachusetts. The vessel being a domestic ship, no lien is given by the general maritime law. There is no statute of this commonwealth giving such a lien, and what the libellant is to show, therefore, is, that he has a lien by the common law of Massachusetts. The common law lien is a mere right to detain the thing put into the party's possession to be repaired, until his charges are paid ; a strict possessory lien founded on actual possession and a consequent right of detention. *The Nestor*, (1 Sumner's R. 81 ;) Abbot on Ship. p. 108 s. 10. This, the counsel contended, is the unquestionable law of England ; and to show that the law of this country was the same, it was argued, 1. From the absence of all authority to show that it was different ; 2. From the recognition of this doctrine by this court in the *Nestor* ; 3. From the various statutes passed by the state legislatures to amend the common law and supply a lien, which should be operative out of possession.

To show that the possession must be actual and exclusive, and so far as it is evidenced by locality, must be in the exclusive dominion of the party claiming the right of detention, he cited Abbot on Ship. p. 108 ; Story on Bailments 286-7 ; Story on Agency, sec. 352 ; *Franklin v. Hosier*, (4 B. & Al. 341) ; *Raitt v. Mitchell*, (4 Campb. 146) ; *Blake v. Nicholson*, (3 M. & S. 167) ; *Chase v. Webmore*, (5 ib. 180) ; *Ex parte Bland*, (2 Rose 91) ; *Ex parte Hill*, (1 Mad. 61) ; *Ex parte Deese*, (1 Atk. 228) ; *The Lady Horatia*, (Bee's R. 167.)

The idea of two concurrent liens of this sort, i. e. of two concurrent rights of detention by parties of no privity of interest, is impossible. *Pothier, Traité de la Poss'n*, chap. 4, sec. 1. For if the liens conflict, and the thing is sold without producing enough to pay both, what is to determine the apportionment ? Liens standing in the same rank of privilege, as those of different seamen for their wages, may be apportioned ; because they do not depend on possession, and, therefore, do not involve the idea of exclusion. But it is otherwise with liens founded on possession, which necessarily involves exclusion. *Jacobs v. Latour*, (5 Bing. R. 130.) Hence, it was argued, that as the record here shows two parties, each claiming the possession, without any privity of interest, and the evidence tended to show an actual possession by both at the same time, so far as there was any possession nei-

ther of them had such an exclusive possession as could alone give a power to detain the vessel.

It was further argued, upon the evidence, that the libellant never took the vessel into his custody, but that she lay at a public wharf, where the dockage was charged to the vessel itself, and not to the libellant, and other mechanics came on board there and worked.

STORY J.—This is a libel against a domestic ship, for materials furnished and repairs made upon her in the port of New Bedford, in this district, to which port she belonged at the time of the repairs. Under such circumstances, it is admitted, that the lien attaches upon the ship by the general maritime law, at least as far as it is recognised and enforced in England and America.

But the admiralty courts of this country possess a general jurisdiction in all cases of material men and shipwrights for work done and materials furnished for ships engaged or employed in maritime commerce and navigation, which may be exercised *in personam* at all times; but can be exercised *in rem*, only upon the maritime law, or in its silence the local law of the state or country where the work and materials are applied, gives a lien. This was held in the case of the *General Smith*, (4 Wheaton's R. 438); and the doctrine of that case has been constantly acted upon in this court as well as in the supreme court, whenever the question has arisen, and required to be decided.¹

In the present case, there is no statute of this commonwealth which gives a lien *in rem* to shipwrights and others for building, equipping, or repairing ships, although in most of the commercial states of the Union such statutes exist. They are founded in a wise protective policy, and I can only express my surprise and regret, that our state legislature has not provided the like remedy for this most important and useful class of our citizens, especially as it has given to carpenters and others a lien on houses under similar circumstances.

But although no state statute exists on this subject, yet as we all know, by the common law, which is a part of the law of Massachusetts, every shipwright has a lien for repairs and work done on a ship while she is in his possession; and the owner or purchaser cannot divest that possession, except by a discharge of that lien. But this lien is strictly founded upon possession; and, therefore, if the possession either remain in the owner during the repairs, or after the repairs are made, the shipwright voluntarily yields up that possession without payment of his charges, his lien is gone, and is no longer capable of being enforced in any manner whatsoever.

These being the undisputed principles regulating this subject, two questions have been argued at the bar in the present case.

The first is, whether, upon the whole evidence, there was any such possession of the schooner claimed by the libellant in this case, as

¹ See *Peyroux v. Howard*, (7 Peters R. 321.) See also *The Robert Fulton*, (1 Paine's R. 620); *Davis v. A new Brig*, (Gilpin's R. 473.)

created a lien for the repairs and the materials sued for, at the time when the libel was filed.

Secondly ; whether, assuming such possessory lien then to exist, it is such a lien as can be enforced in the admiralty jurisdiction, considering the schooner to be a vessel employed, (as without doubt she was) in maritime trade and navigation.

Upon this last point, I do not think, that the slightest doubt can now be entertained.

Since the decisions made in the supreme court, the question is not, how the lien arises under the local law, whether it be by statute, or the common or the municipal law. That is wholly immaterial. The lien is enforced because it is of a maritime nature ; and the moment its existence is established the jurisdiction of the admiralty attaches to it *proprio vigore*. Such, as far as I know, has been the uniform understanding and practice, in all the admiralty courts of the Union.

In respect to the other question, it involves rather the consideration of matters of fact, than of law. I pass over without remark, every thing, which has been suggested at the argument, in respect to the joint possession asserted in the original libel, by Spooner and the libellant, (McFarlin), and their joinder in one suit of their respective independent claims for work, and labor, and materials. After the severance of the suit in the court below, the present appeal brings nothing but McFarlin's claim before the court ; and the sole question is, not whether he and Spooner had, or could have a joint possession upon their separate and independent claims and liens ; but whether McFarlin had such a possession and lien as he now asserts in his own libel, to sustain his separate suit.

The facts as they appear in the evidence, are these. McFarlin is a shipwright by trade, and has his ship yard, where he repairs ships, on a small island, of which he hires about one half of the owners in fee, Messrs Randall & Haskell, who have also a wharf on the premises. McFarlin has been accustomed to use this ship yard, and make repairs at or near the wharf for about seven years. By a contract and understanding between Randall & Haskell and the libellant, the libellant is at liberty to repair any vessels at their wharf, and fasten them there ; and the wharfage during the repairs, instead of being charged to the libellant, is charged to the owner of the vessel repaired. In this very case, the schooner Marion was brought from a wharf on the other side of the channel by the libellant and his workman, and certain riggers, and fastened at the wharf during repairs. The wharfage was charged to the Marion, and has not yet been paid by any person. During the time of the repairs by the libellant, between the 28th of October and the 21st of November, 1839, when they were completed, the libellant and his workmen were on board every day. One David Field also during a part of the time, while these repairs were going on, was on board doing work as joiner, in the cabin ; and his work was not completed until about the beginning of January, 1840. Spooner was doing the work of a painter on board during a part of the same period. While

the repairs were making, Goodwin, the owner, having become embarrassed and in doubtful circumstances, the libellant became solicitous about his pay; and accordingly he constantly told Field, that he should insist upon his retaining possession of the schooner until he was paid in full. He also directed one of his workmen who was employed by him in a neighboring shop to keep a constant watch upon the vessel by day and by night, and if any person attempted to remove her, without his leave, to prohibit him. The libel was filed in the district court, on the nineteenth of December, 1839; up to which time and afterwards, the schooner remained fastened at the wharf, the libellant going constantly on board, and asserting his intention of holding the possession, to Field, who was at work on board; and during all this period no person attempted to remove the schooner. So far, then, as any evidence exists in the case, the original possession taken by the libellant when he undertook to repair the schooner, and for this purpose carried and fastened her to the wharf near his ship yard was never disturbed or interfered with.

Now upon this posture of the facts, it seems to me, that the possession of the schooner must be deemed to have been originally taken and held by the libellant from the time when he fastened her to the wharf, until the time when she was libelled. He took, and held all the possession, which, in the critical circumstances, he was able to take; and he asserted his right of possession openly. It is not necessary to say, that this possession was to be treated as to all intents and purposes a possession exclusive of the owner. In one sense, it was the possession of the owner, and under him, and not adverse to him, and in the nature of a bailment. But it was such a possession as was, in my judgment, sufficient to found a lien upon that possession with the consent of the owner.

If the schooner had been hauled up within the natural limits of a ship yard, owned or hired on a lease by the libellant, no one could doubt that the possession of the schooner there, was such a possession as would found a lien, even though other workmen for other purposes were admitted to be on board, such as ship joiners, and riggers, and painters.

The possession for some purposes might well be deemed the possession of the owner, as for example, to entitle him to an action for a tort done to the vessel. But for the purpose of founding a lien in the shipwright, the possession would be deemed in the shipwright; as much so, as if the repairs had been made in an enclosed dock yard of the shipwright.

Then, does the fact, that the wharfage was to be charged to the owner of the schooner make any difference?

I think not. It was a mere arrangement between Randall & Haskell and the libellant for their mutual benefit, with which the owner, as such, had nothing to do.

It amounted to an agreement on the part of Randall & Haskell, that they would look for their pay to the owner, and not to the libellant;

but not to any waiver of the possession by the libellant founded on his general use of that wharf for the purposes of his business. Under the arrangement between Randall & Haskell and the libellant, the wharf was as much to be deemed in his possession and under his control for the purpose of the repairs as under his lease were the neighboring shipyard and other grounds.

Whoever seeks to divest an apparent possession of a shipwright, should, as I think, show by incontestable proofs, that the real possession was understood between the parties to remain in the owner.

That would naturally be inferred if the ship should be repaired at the wharf or dock of the owner, or at the wharf or dock of a third person, by a direct contract between the owner of the wharf and the owner of the ship, with which the shipwright had no privity or connexion. But, here, the only arrangement actually made, is between the shipwright and the owner of the wharf; and this not for one vessel but for all vessels, which the shipwright should or might repair there. The license was to him generally and not to any owner in particular.

Upon the whole, my judgment is, that the decree ought to be affirmed with costs.

District Court of the United States, New York, August, 1840.

UNITED STATES V. THE SCHOONER CATHERINE—TYNG, CLAIMANT.

The slave trade: Construction of the act of Congress of March 10, 1800.

There is nothing in that act to reach the case of an American vessel, built and fitted out for the slave trade, but actually sold to a foreigner and employed by him.

THIS was a prosecution *in rem*, seeking the forfeiture of the vessel for being engaged in the slave trade. The bill articulated upon various acts of congress, charging against the vessel the circumstances which incur a forfeiture by the provisions of these acts. On the hearing, however, the contestation between the parties was limited to the fifth article alone. That allegation was, that the schooner being the property, wholly, or in part, of a citizen or citizens of the United States, or of persons residing within the United States, to the libellant unknown, was, on or about the first day of July, 1839, employed and made use of by some person, or persons residing in the United States, to the libellant unknown, in the transportation and carrying of slaves from some foreign country, or place, to the said libellant unknown, to some other foreign country, or place, to the libellant unknown, contrary to the act of congress of May 10th, 1800.

On the 15th of June, 1839, the claimant, as agent of the owners, chartered the vessel to John S. Thrasher, for a voyage from Havana to the Isle of Principe, or other part or parts of Africa, as the agent

of the charterer might direct. The vessel was laden and despatched by the charterer, and was captured on the 13th of August, in the prosecution of her voyage, by a British cruiser near the coast of Africa.

BETTS J. It is admitted that the ownership of the vessel is in citizens of the United States, and it is unnecessary, under the view the court takes of the case, to enter upon the question whether the claimant has shown a lien or privilege in respect to his advances to the owner, which would be protected in case of the condemnation of the vessel.

The supreme court having decided in the construction of this statute, that "the vessel in question was employed in the transportation of slaves within the meaning of the act, if she was sailing on her outward voyage to the African coast, in order to take slaves on board, to be transported to another foreign country," I should have no difficulty, upon a careful review of the facts and circumstances, in deciding that the charge of the libel had been fully sustained against the vessel, if the charter party, and her outfit and the proceedings under it, were the controlling facts of the case. Looking at the case in this point of view, I am not able to discover that it can be distinguished favorably to the claimant from the case of the *Butterfly*, recently decided in this court. The pertinency and weight of a similar class of facts and circumstances were fully considered by the court in that case, and it may be added that some particulars exist here which would probably be regarded as rendering the inferences and presumptions then recognized and adopted, still more direct and conclusive. It seems to me, however, that the enterprize assumes a new character subsequent to the execution of the charter party, and so far as the charge in the libel now under consideration may be made to affect it. On the 25th of June, the claimant contracted to sell the vessel to one Teran, for \$20,000, and to deliver her at Bona, on the coast of Africa, on or before the first day of October thereafter, and received \$7000 of the consideration money in advance. On the same day, the charterer made in writing a modification of his charter party, and engaged to relinquish the vessel "after the cargo I have now on board is landed at the Isle of Principe in accordance with the bill of lading," to enable the claimant to deliver the vessel to Teran, at Bona, according to his contract. It is not to be concealed that this whole arrangement bears the semblance of being a common concern between Thrasher and Teran, in respect both to the charter and purchase. A scrutiny of the evidence cannot fail to make the impression that the two acts were preconceived parts of the enterprise; that the vessel should wear its American character to the coast of Africa, with a view probably to avoid the application of the treaty between England and Spain and the hazard of interception of British cruisers; and that when there she should become Spanish before venturing on her return voyage, lest the officers and crew might be declared pirates under the act of Congress of May 15, 1820.

If this be so, it would tend to confirm the verity of the representa-

tion that this was an actual contract of sale, and that the vessel at Bona was to become wholly Spanish property. This particular is of great importance in determining the application of the act of congress to the case.

There is certainly nothing in that act inhibiting an American vessel from carrying any description of cargo to the coast of Africa. She may be legitimately let on freight or chartered for such a voyage. If every thing she undertakes to do as a vessel of the United States, be to carry out and deliver a cargo, she would not, in fulfilling such an engagement, come within the prohibitory enactments of the statute. The statute reaches her only when the evidence shows that her outward voyage is only in part fulfilment of her employment as an American vessel, which is to be continued and consummated by transporting slaves into some other foreign country. The broadest latitude the supreme court gives to the term *employment*, as evidence of such illegal voyage, falls short of being satisfied by the mere transportation of an outward cargo. The decision requires that it shall farther appear that the vessel was on such outward voyage for the purpose of taking on board a cargo of slaves as part and parcel of the adventure. In a prosecution of persons serving on board such vessel, it may be of no importance whether the vessel was to retain or change her national character after reaching the outward port, provided the whole enterprise was to be regarded as one voyage. But it is apprehended a prosecution under the first section against the vessel cannot be sustained without showing that the whole adventure contemplated by her is to be performed by her in her American character. The terms of the section are these. "That it shall be unlawful for any citizen of the United States, or other persons, residing within the United States, directly or indirectly to hold or have any right or property in any vessel employed or made use of in the transportation or carrying slaves from one foreign country or place to another, and any right or property belonging as aforesaid shall be forfeited," &c.

The penalty of this act is plainly levelled against American property employed as inhibited, and the confiscation is limited to the American interest held in a vessel at the time she is employed in the slave trade. There is nothing in this statute to reach the case of an American vessel, built and fitted out for the slave trade, but actually sold to a foreigner and employed by him.

What then is the application of the act to the facts of this case? Upon the proofs I am satisfied that the vessel was chartered, fitted out and laden at Havana with intent to be employed in the slave trade prohibited by this act, and it is settled by the decisions of the supreme court upon the import of the term "employed" as used in the act by congress, that "to be employed in any thing, means not only the act of doing it, but also to be engaged to do it," and accordingly the chartering and fitting out the vessel at Havana with design to have her perform the voyage then arranged, brought the transaction within the prohibition of the act; and had the seizure been made under that state of

facts, the condemnation of the vessel must have been pronounced by the court. The proof, however, is equally strong that in this incipient state of the enterprise the voyage was changed, and the vessel then was put under 'contract and orders' to carry out a cargo and freight, and deliver it at Principe to the charterer in fulfilment of the contract of sale. There is nothing beyond vague suspicions to connect this ulterior change of the destination of the vessel with the voyage first contemplated. St. Thomas and Principe are near the Equator; if the Bona, to which the vessel was directed, be the port in Algiers, the great distance of the points apart would strongly denote an entire disconnection of the undertaking. No evidence is offered that there was any place of that name in the vicinity of Principe, nor other fact evincing the object of the voyage to be continuous and identical, and I am accordingly bound to hold, upon the testimony, that the vessel sailed from Havana to deliver a cargo at Principe, and was then wholly discharged and separated from that employment, and was after that to be taken to Bona and delivered to the purchaser. This adventure prosecuted with such intent cannot be brought within the interdiction of the statute, and I shall therefore decree that the libel be dismissed and the vessel delivered up to the claimants.

I am aware that this is a point of importance and difficulty; my duty, however, is to express the result of my own reflections upon the subject, and this I do with the greater promptitude, because from the magnitude of the question and interests involved in the decision, the judgment now pronounced will be submitted to the review of the appellate courts.

There being no condemnation of the vessel, the petition of the seamen for wages out of the proceeds must be also determined.

Ordered that the libel be discharged and the schooner Catherine, her tackle, &c. be delivered up by the marshal to the claimant.

Supreme Court of Pennsylvania, July Term, 1840.

FREEMAN V. CALDWELL.

A purchaser, under his own execution, of chattels subsequently recovered from him by title paramount to that of the debtor, may not have a new execution for the amount thus levied.

THIS was a *scire facias* to have execution of a judgment in the common pleas of Lycoming county. The defendant pleaded payment, and gave in evidence a writ of *ieri facias* on which a return of "levied and sold thirty neat cattle to the plaintiff" for the amount of the debt, was endorsed and filed; to rebut which, the plaintiff proved that the cattle had been recovered of him by a stranger in an action of replevin on a title paramount. The court directed a verdict for the

plaintiff. The point was argued on a writ of error to this court by *Armstrong* and *Campbell* for the plaintiff in error; and by *Parsons* and *Grenough*, *contra*.

The judgment was delivered by

GIBSON C. J. In judicial sales there is no warranty. The principle is universal, but particularly recognized by us in judicial sales of land which we treat as a chattel for payment of debts; and it is, of course, equally applicable to the judicial sale of a chattel pure. What interest in it does the sheriff propose to sell? Not a title to it, but the debtor's property in it whatever it may be; and the vendee, when the thing has been recovered of him, has no recourse to the price of it in the hands of the sheriff or the creditor's pocket. In the case of the *Monte Allegre*, (9 Wheat. 616) it was ruled that a loss sustained by the marshal's vendee of a rotten article sold by a sample with which it did not correspond, should not be made good out of the proceeds in court. Why shall not the same principle be applied to a purchase by the judgment creditor himself? By his bid, he may have prevented a sale to a stranger who could have had recourse to no one, and thus have deprived the debtor of the benefit of his doubtful title which may have been a legitimate subject of value to him. In the one case and in the other, the produce of it has, in contemplation of law, been brought into court and distributed; and the matter has consequently passed *in rem judicatum*. In *Canon v. Smalwood*, (3 Lev. 203), it was said, *arguendo*, that though the sheriff may pay directly to the plaintiff, his license in this respect is by permission of the court, and not by force of the law; and to the same effect, is *Wortman v. Conyngham*, (Peters C. C. R. 243). Indeed, the very command of the writ makes it the sheriff's duty to return it. Even when the plaintiff is the purchaser, he is supposed to have paid the price in the first instance, and to have received it back under an order of the court. It is a trite but invaluable maxim, and of course conclusive evidence of the law, that when different rights or characters exist together, they are to be treated, *reddendo singula singulis*, as if they existed separately—*cum duo jura in una persona concurrunt, æquum ac si essent in diversis* from an application of which, it results in the case before us, that had the original judgment been reversed, the price and not the cattle, would have been restored. For the same reason, the judgment creditor might have been compelled to pay the sheriff surplus purchase money, had there been any; nor could he have recovered it back from the debtor after the sheriff had paid it over. It is not pretended that either party might not hold the other to the sale as to that; but the plaintiff asks to treat the execution and the property levied in satisfaction, as a shopkeeper treats a bad note; and to proceed as if the whole were a nullity. But if want of consideration may be set up to annul a part of the sale, why might it not be set up to annul the whole? There is no foundation in reason or justice for a distinction. Thus stands the question on principles of analogy; and how stands it on the authorities cited to us as in point? *Adams v. Smith*,

(5 Cowen 280), was a motion to amend by striking out the amount of sales endorsed on the execution, to make way for an *alias*; which, it will be perceived, involved no more than an exercise of judicial discretion which, in that instance seems to have been a pretty sharp one. Yet even that case concedes the necessity of getting the sheriff's return out of the way of a fresh proceeding. In *Lansing v. Quackenbush*, (id. 38), the court refused leave to amend in the case of land on a supposition that the purchaser could be relieved only in equity; though how a chancellor could rescind a judicial sale by a common law court, and at the instance of a purchaser who had taken the risk of the title, can be known only to those who are familiar with the practice in that state. Still the question had relation to amendment, and no one dreamt of treating the return as a nullity. In *Stogel v. Cady*, (4 Day. 222) there was neither return nor sale, but payment extorted by an illegal levy which was of course discharged by the receipt of the debt. None of the cases, then, resemble the present; and in *Whiting v. Bradley*, (2 N. H. R. 79) in which the *scire facias* was founded on a statute, every thing said by the judge who delivered the opinion of the court, in relation to the principle of the common law, was extra judicial, and, it seems to me, without foundation in authority. That the return on a *fieri facias*, is always parcel of the record, is unreservedly asserted in 2 Saund. 344, note. 2; and that it is conclusive betwixt the parties is as plain from the assertion that *nil debet* can not be pleaded to an action of debt on it. It may indeed be impeached when put in issue; but can it ever be in issue betwixt the parties to the original action? The cases cited to the contrary, prove that it cannot; and instances of its inconclusiveness in regard to strangers, are not to the purpose. On the common principle of estoppel, it concludes only parties and privies, and it can therefore be falsified by any one else—a distinction to which the American courts seem not to have duly attended—but can any man lay his finger on an English case, in which a sheriff's return to an execution, has not been allowed to have that indisputable verity attributed by Lord Coke to every record without exception? Like every other record it may be amended to make it conform to the truth; but to expunge it would be to corrupt it, and to abuse that discretionary power which has been given to the courts for a better purpose. The judge who tried the cause before us, rested it on authorities which show that, in a plea of former levy, the property is said to have been in the defendant. Taking the practice to be so, is not the sheriff's return, which is of such high regard as to admit of no averment against it, conclusive evidence betwixt the parties to the action that the fact was so? It is this principle of conclusiveness which originally made execution of the body satisfaction of the debt; which still makes a return of levied to the value, a discharge of the judgment; and which lies at the root of every such matter. It is because the record of a judicial act cannot be unravelled to let in subsequent matter, that this is so at the common law; and it is for the same reason that before the 32 H. 8, there was no re-extent upon an

eviction of the tenant by elegit. "Nota," says Lord Coke (1 Inst. 190 a) "it appears by the preamble of the said act, and by divers books, that after a full and perfect execution had by elegit returned and of record, there never shall be any re-extent on any eviction, but if the extent be insufficient at law, there may go out a new extent." Here then is distinctly announced the common law principle which rules the case; and though it has been abrogated in England so far as regards land, yet in Pennsylvania there is no statute on the subject. The silence of the repealing act as to chattels, was imputed by Mr. Justice Woodbury, in *Whiting v. Bradley*, to a supposition that creditors could even then have a new execution of every thing but land; but it is plain from the special provision in the statute of New Hampshire, the legislature of his own state thought otherwise. Indeed the stat. Westm. 2, which gave the writ of elegit, had put land and chattels on a footing in all respects but the relative quantity which might be levied of each, and the manner of its application to purposes of satisfaction; and it is probable, the reason why the latter were not included in the 32 H. 8, was, that the progress of trade had not involved the title to things personal so frequently in complication and doubt, as to cause any great inconvenience from it. Under the stat. Westm. 2, therefore, a difference of construction in regard to the point before us, could not have arisen from the circumstance suggested, that an extent must always be returned to found the title of the tenant; for though an inquisition need be returned under that statute only in the case of land, when it is actually returned, as it must be when required, it is equally parcel of the record. As we determined in *Gratz v. Lancaster Bank* (17 S. & R. 278), the distribution of money brought into court, is a judicial act; and the foundation of it is consequently a matter of record.

Without power derived from a statute, therefore, I take it that execution cannot be repeated; and though this clear common law principle may be violated, it cannot be evaded. It is among the worst symptoms of the judicial epidemic of our day, that the bent of the professional mind is towards oral testimony in preference to record, or written proofs. What motive could there be, were it allowable in principle, to overturn the record in this instance? The plaintiff's case may be thought a hard one; but it is not more so than would be the case of a stranger, and to say that every sheriff's vendee who is deprived of the property by title paramount, shall have his money again, would destroy all confidence in the stability of judicial sales. He takes upon him a risk which may turn to his disadvantage; but he does so at the premium of a reduced price. Were it not for this risk, a plaintiff might safely appreciate the defendant's title, and buy it in at a sacrifice. If it prove good, he would have it at an undervalue; if bad, he would be only where he began. His interest, instead of being promoted by a sale for an out side price, would be to have the property sacrificed; and it is impolitic to encourage a principle which would make him a speculator. In this respect, an advantage over the other

creditors, would be, not only unjust as to them, but ruinous to the debtor. On grounds of reason and authority, therefore, he ought to stand as any other purchaser.

Judgment reversed.

Court of Chancery, New York, October, 1840, at Saratoga.

STATE OF ILLINOIS V. DELAFIELD.

The officers of a state who are authorized to borrow money for its use, cannot contract to sell and deliver the public securities on a credit, without an express authority for that purpose.

Where certain officers of the state of Illinois were authorized to contract for loans, upon state stock, payable in instalments, under an express prohibition that the stock should not be sold for less than its par value; and the officers sold the stock on a credit, the money to be paid to the state in periodical payments, without interest, although the bonds were to be delivered in advance and were to be on interest immediately; it was held, that the transaction was wholly unauthorized and illegal.

THIS was an application for an injunction to restrain the defendant from selling, hypothecating, or parting with certain bonds or certificates of public stock of the state of Illinois, or the proceeds thereof, and for the appointment of a receiver of the bonds or certificates which remained in the hands of the defendant, and of the proceeds or avails of such of the stock as had been sold.

The bonds for three hundred thousand dollars of the stock, were signed by the governor and auditor of the state, and countersigned by the treasurer, as directed by the act of the ninth of January, 1836, for the construction of the Illinois and Michigan Canal; and the bonds of two hundred and eightythree thousand dollars, the residue of the stock, were signed by the fund commissioners, and were countersigned by the auditor, as authorized by the act of February, 1837, to establish and maintain a general system of internal improvement. The interest upon the first bonds, at the rate of six per cent. per annum, was payable semi annually at New York or Philadelphia, at the option of the holders, and the principal reimbursable at either of those places at the pleasure of the state, after the year 1860, and the other bonds were payable in the same manner, except that the principal was not reimbursable until after the first of January, 1870. The first parcel was received by the defendant under an agreement made by the agents of the governor, who was authorized by law to appoint agents to borrow money upon such stocks for the making of the canal; under an express prohibition, however, contained in the statute, that the stock should not be sold for less than its par value. And the last parcel was received by the defendant under an agreement made with the fund commissioners. They were authorised to make loans of money for the internal improvement of the state, and to issue such bonds for the

money loaned thereon, but under a similar restriction, that the stock or bonds should not in any event be sold for less than par value. The bonds in both cases were sold to the defendant on a credit, the money to be paid to the state in periodical payments without interest, although the bonds were to be delivered to the defendant in advance, and were to bear interest immediately. The defendant had paid to the agents of the state about \$170,000 towards the bonds, but had made default in meeting the other instalments as they became due, leaving more than four hundred thousand dollars of the amount of the bonds delivered still due and unpaid according to the contracts.

Daniel Webster and William Kent for the complainant.

G. Griffin and E. S. Van Winkle for the defendant.

WALWORTH, CHANCELLOR, after going over the various positions taken by the counsel, concluded as follows :

Even if the usage was otherwise as to sales of stocks belonging to individuals, that would not authorize the officers or agents of a state, who were authorized to borrow money for its use, to contract to sell and deliver the public securities on a credit without an express authority for that purpose. The two or three recent instances in which states have had the misfortune to lose large amounts of their stocks, in consequence of the mistakes of their agents in suffering the stock to go out of their hands before they had received the money agreed to be loaned, cannot amount to a general usage to sell state stocks on a credit.

Indeed, the very idea of selling these state bonds on a credit, is entirely inconsistent with the spirit of the statutes of Illinois, under which these bonds were to be issued. These state securities in the hands of its agents, were not an article of merchandize. The object was to borrow money, not to sell stock in the ordinary way in which stock held by individuals is sold. The statute does indeed authorize the agents of the state to contract for loans—payable by instalments, as the money may be wanted for the use of the state ; but this does not imply that the lenders are to receive the securities of the borrowers before the money agreed to be loaned is actually lent. I am not aware that any sane and solvent man ever borrowed money by giving his negotiable securities in advance to the lender, taking pay in his promises instead of cash ; unless those promises were put in such a form as to be convertible immediately into cash, at some rate, and were intended to be sold at a discount, to raise the money elsewhere. In this case, however, the agents of the state contract to deliver the securities of their government in advance, and to take a mere agreement which is not negotiable to pay the money to the state, by instalments, at future times. This is not a borrowing of money, but is a sale of the state securities, as an article of merchandize, on a credit, without any authority expressed or implied to give such credit. The necessary result of such a transaction must be, if there is any great fall in the price of the stock before the time for the actual payment of the

money arrives, that the borrower will be unable or unwilling to fulfil his agreement, and the state will lose its securities. Upon this ground, therefore, as well as upon the ground that the sales of the stock were below its par value, the agreements with the defendant were wholly unauthorized.

It is said, however, that the state of Illinois has confirmed the acts of its agents, who made these sales, and that it is now too late to rescind the agreements as having been made without authority. No officer or agent of the state had any power to make or to authorize the making of such contracts originally; and of course none of them had the power to confirm them afterwards. For no person can confirm an unauthorized agreement made by another, unless he had himself the power to authorize the making the agreement. As the sovereign power of the state, by its legislative act, had prohibited any of its officers or agents from selling its stock below their par value, it follows, of course, that nothing short of a law of the state proceeding from the same authority can legalize the transaction.

I admit that the general financial agents of the state may sometimes interpose their powers to protect its interests where they are endangered by the unauthorized acts of others. And probably in this case those agents might have made an arrangement with this defendant, for a return of the securities which he had not sold, and a compromise of the claim against him for the others to prevent an entire loss of this stock, which a court of justice would consider as binding upon the state. But if they had any power to make a settlement of the claim of the state against the defendant for the stock received by him under these unauthorized agreements, it must be to make an agreement in the nature of an accord and satisfaction of the claim, and not by way of affirmation of the original unauthorized contracts.

Whether any such power existed it cannot be necessary now to determine; for there is no ground of pretence in this case that there has been an accord or satisfaction. The defendant has received and retains the bonds of the state to the amount of \$583,000, and has paid thereon but \$170,000. The balance he has neither paid, nor agreed to pay, except by the original contracts which he now refuses to fulfil. The fact that one branch of the legislature of Illinois temporarily concurred in the report of its committee that these contracts were unauthorized, could not have the effect to injure him by depreciating the stocks which he had previously sold. And if he did not wish to sustain a loss on those which then remained on hand, his proper course was to offer to return them to the agents of the state, instead of selling them afterwards at a loss, and thereby compelling the state to pay to others the whole nominal amount of the bonds which he had obtained from the agents of the state without authority. If the bonds had been sent by him to England to be sold, as suggested by his counsel, he should have offered to return them, as soon as they could be sent for and received back from that country.

The contracts for the delivery of the bonds being wholly unauthor-

ized, and there having been no subsequent ratification by the legislative power of the state of Illinois, or any officer or agent who had the power to ratify these illegal sales of the stock, an injunction must be granted as prayed for. And it must also be referred to a master in the city of New York to appoint a receiver, and to take from him the requisite security; unless the complainants should prefer to have the New York life insurance and trust company appointed such receiver, in which case no security is to be required. The defendant must also assign and deliver over to the receiver, on oath, under the direction of the master, such of the stock or bonds, if any, as are now in his possession, or under his power or control, and the proceeds of such stock or bonds as have been sold, pledged, or hypothecated by him, and all contracts and securities and other property taken therefor.

The receiver is to have the usual powers for the conversion of the securities and proceeds of such sales into money; and to deposit such money in the trust company to accumulate, as often as the sum of \$1000 shall be received beyond the necessary expenses of the trust. The Illinois bonds, if any, are not to be sold by the receiver, but are to be deposited in the trust company for safe keeping, to abide the further order of this court.

Supreme Court, New Jersey, September Term, 1840, at Trenton.

CADWALLADER V. HOWELL AND ANOTHER.

Question in relation to the plaintiff's right to vote in New Jersey.

THIS was an action brought against the defendants as two of the judges of election of the township of Ewing, for wilfully and unlawfully rejecting the plaintiff's vote at the state and congressional election held in October, A. D. 1838. The case was submitted to the court upon a statement of facts agreed upon by the respective parties and their attorneys, by which it appeared, that the plaintiff was born and brought up in said township—had been a freeholder, owning a mansion house and farm which he inherited from his father in 1823, and which had been occupied by himself and family since that period (except as hereafter mentioned)—that he had been regularly assessed, and paid taxes both for his real and personal estate in said township, and had always voted there previous to 1838, when his vote was rejected by the defendants. That for 15 years past, the plaintiff, having extensive family connexions and friends in the cities of Philadelphia and New York had been in the habit of spending a part of every winter in one or both of those cities. That in 1837, for his greater convenience, he rented a house in Philadelphia, at an annual rent, for two

years, and furnished it ; and in December of that year, at the usual time of his annual visit to the city, he went with his family and occupied the house so rented, until the following spring, when he returned to his residence in Ewing. On his visits to the city, and especially in the winter of 1837 and '8, he took his horses and carriage, and a part of his servants with him ; but always paid taxes for them in Ewing. His mansion house and farm during his absence, was occupied by hired persons ; and the plaintiff and his servants were in the habit of visiting it, and occasionally occupying it during the winter. The plaintiff had never designed to change his residence, and had uniformly declared his intention to be to continue his domicile in New Jersey, where his ancestors had lived and died.

THE COURT were unanimously of opinion, that the plaintiff's legal residence was in New Jersey ; that his vote was unlawfully rejected, and that he was entitled to recover against the defendants. Judgment was entered accordingly.

Supreme Court of Missouri, May, 1840.

DRAKE V. ROGERS AND ANOTHER.

No presumption in favor of the execution by creditors, of a deed of assignment will be made in a case where important benefits are stipulated for, by the debtors.

One partner cannot make an assignment of the partnership effects for the benefit of creditors. Whether this rule applies to dormant partners, *quære*.

THIS was an appeal from the St Louis circuit court. The appellees brought an action of assumpsit against Thomas C. Eads, Ezekiel Buchanan, and Freeborn Sisson. An attachment issued, on the usual affidavit, which was served on the defendant Sisson, but was not executed on Eads or Buchanan. Divers persons were summoned as garnishees, and among others Charles D. Drake, the appellant. The answer of Drake, after responding negatively to the interrogatories, stated, that on the 4th of April, 1836, the said Eads and Buchanan executed to him a deed of assignment, a copy of which, with its amended schedule, was attached to his answer. He further stated, that he had taken immediate possession of the goods pointed out to him, as the stock of said Eads and Buchanan, and immediately placed the goods at an auction store, to be sold. He also took possession of the goods *in transitu*, consigned to said firm, as soon as they reached St Louis. An account of the sales was given to the amount of \$2622 89 ; and he admitted that there was in his hands, as assignee, after deducting expenses of sale, \$2292 20. No disposition had been made of the lands assigned.

The deed of assignment was a tri-partite deed, between Eads and

Buchanan of the first part, Drake of the second part, and the creditors of Eads and Buchanan, who should become parties thereto, of the third part. The deed was executed by Eads in person, under seal ; by Buchanan, by his attorney, Drake, on the 4th of April, 1836 ; by Drake, as party of the second part, on the same day ; and by three creditors, who executed by their attorney Charles D. Drake, under seal, on the 3d of August, 1836.

The trusts declared in the deed were :—*First*, To pay expenses of assignment. *Second*, To pay the claims of the several creditors, headed "preferred creditors." *Third*, To pay the claims of those creditors who should execute the deed within four months from the date of the deed ; with a proviso, that no claim should be paid, unless the claimant should come into the deed as above stated. The deed contained a release from all the creditors.

Charles D. Drake filed an interpleader, and claimed the property attached in the hands of two of the garnishees, and the issue upon the interpleader was submitted to the court, sitting as a jury, which issue was found against Drake. Drake then moved to be discharged as garnishee, which motion the court overruled, and the court rendered judgment against the garnishee for the amount of the judgment obtained against the defendants. A motion was made by Drake for a new trial, because the verdict was against law and evidence, which was overruled and exceptions taken.

From the bill of exceptions it appeared that Freeborn Sisson, one of the defendants in the writ, was a dormant partner in the house of Eads and Buchanan ; that he was not in the city of St Louis, when the assignment was made, or when it was executed, and the same was executed without his knowledge or consent.

The opinion of the court was delivered by

NAPTON J.—The deed of assignment in this case contains the same stipulations for a release, which this court has pronounced fatal in the case of *Brown v. Knox and Boggs*, (3 Law Reporter, 166), decided at this term. But two other points have been raised, distinct from those disposed of in that case.

The first is, that this assignment was not executed by any of the creditors, until after the levy of the attachment. The deed of assignment was a tri-partite deed, and the creditors who were to become parties on a third part, by executing the deed, released all demands and claims upon the property of the assignors, except such as accrued by virtue of the deed itself. Where a deed is for the benefit of a party, the law will not presume his dissent, and his execution of the deed might not be necessary to its validity. But no presumption in favor of the execution of the instrument by the creditors can be made in this case, where important benefits are stipulated for by the debtors. Even the preferred creditors might well hesitate before they would sign the deed, where they, in common with all others who might sign, would release the debtor from all future liability. The

facts in this case appear to coincide very well with this legal presumption, as we see that only three creditors signed, and not until nearly four months had elapsed after the execution of the instrument by the assignors and assignee. The assignment was, therefore, for this reason, void against the attaching creditors.

It is also urged that the deed was insufficient to pass the partnership effects, because Freeborn Sisson, a dormant partner of the firm of Buchanan and Eads, did not execute it.

This court held in the case of *Hughs v. Ellison*, (5 Mo. Rep. 463,) that one partner could not make an assignment. But I do not perceive how the rule, admitting it to be correct, could apply to a dormant partner. The ostensible partners may sue and be sued, without any notice of the dormant partner, and why may they not also make an assignment without his consent? No authority on this point has been cited, but it has not been shown how third parties can be prejudiced by such an assignment. The dormant partner might perhaps have reason to complain, but so far as the rest of the world are concerned, they have not been prejudiced. This objection ought not to avail in my opinion in a suit of this description.

McGIRK and TOMPKINS, Justices, concurred in this opinion, except as to the last point.

Judgment affirmed.

DIGEST OF AMERICAN CASES.

Selections from 4 Blackford's (Indiana) Reports.

ASSUMPSIT.

If a party having covenanted to perform certain work, has performed it but not agreeably to the covenant, the person for whom it was done may, either expressly or impliedly, render himself liable in assumpsit for the work done.—*Canby v. Ingersol*, 493.

BANK NOTES.

1. Where bank notes have been obtained from the owner by means of a forgery, and have been received by a third person *bona fide*, for value, and without notice, the claim of such third person, if he was guilty of gross negligence in taking the notes, must yield to that of the original owner.—*Coffin v. Anderson*, 395.

2. A. obtained certain bank notes

from a bank by means of a forgery and afterwards exchanged them with another bank and with individuals for other bank notes. Held, that the bank imposed on by the forgery, was entitled to the last mentioned bank notes, which were in A's possession and had been received by him as aforesaid, as its property.—*Ib.*

CHANCERY.

A bill in chancery containing a claim against a defendant in his individual capacity, and another against him as an heir for the debt of his ancestor, may be objected to for multifariousness; but the objection must be made before the defendant has answered the bill.—*Bryan v. Blythe and another*, 249.

COMMON LAW.

The common law, so far as it does not interfere with the statutes of a state, must be presumed to be in force within such state.—*Titus v. Scantling and wife*, 89.

COMPANY, UNINCORPORATED.

1. An unincorporated company cannot sue in the name of the firm.—*Davis v. Hubbard and another*, 50.

2. If an unincorporated company sue in the name of the firm, the suit will be dismissed on motion.—*Hughes v. Walker and another*, 50.

CONTRACT.

1. A person contracted to work for a year at a certain sum per month; but after working three months and ten days, he left his employer, and sued him for the work thus done. It was proved that the defendant had manifested a disposition to get the plaintiff to leave him, and had said after the plaintiff was gone, that he was glad of it, as the plaintiff was worth nothing. Held, that the action was not sustained.—*De Camp and another v. Stevens*, 24.

2. A contract by which two persons by name, describing themselves as trustees of a certain school district, agree that the "trustees" shall pay a teacher a certain sum for his services, and which is executed by those persons in their own names,—is binding upon them individually.—*Wiley v. Shank and another*, 420.

CORPORATION.

1. A corporation legally created in any one of the states, may sue in the courts of Indiana.—*The Guaga Iron Company v. Dawson*, 202.

2. The declaration in a suit brought in a corporate name, need not aver the plaintiffs to be a corporation.—*Harris v. The Muskingum Manufacturing Company*, 267.

COVENANTS.

Where, in an agreement between two parties, there are covenants to be performed by each at the same time and place, the party who sues must aver that he has performed or offered to perform his part, or show a legal excuse for his not doing so.—*Van-kirk v. Talbot*, 367.

DEPOSITES IN BANK.

1. The receiving of bank notes in a bank on special deposit, is as much a bank transaction as the receiving of them on general deposit; but the nature of these two kinds of deposits is very different.—*Coffin v. Anderson*, 295.

2. When bank notes are received in bank on general deposit, they become the property of the bank, and their amount is a debt payable on demand by the bank to the person entitled to it. If payment in such case be afterwards refused, the creditor's only remedy is an action of debt or assumpsit against the bank.—*Ib.*

3. But if the deposit of the notes be special, there is no change of property, and the deposit is nothing but a bailment. The conversion of such a deposit by the cashier is a tortious act, for which he is individually liable in an action of trover.—*Ib.*

DOWER.

1. The term *messuage*, as used in the statute regulating dower, may include a few acres of land adjacent to a dwelling house, but not a whole farm.—*Grimes and another v. Wilson and wife*, 331.

2. If a widow enter upon the lands of her deceased husband, other than "the mansion house and messuage thereunto belonging," and appropriate the proceeds to her own use, she is a wrong-doer, and amenable to the proprietor of the land for the rents and profits.—*Ib.*

EVIDENCE.

1. The possession of a bond by a third person, is a strong circumstance to prove that he is authorized by the obligee to collect the money.—*Hackleman and another v. Moul*, 164.

2. In a suit on a bond against the principal and his sureties, the acknowledgments of the principal may be proved to show his own liability; but *quære* whether they can be considered as evidence to affect the other defendants.—*Ib.*

3. A bill of lading with no qualifying terms is *prima facie* but not conclusive evidence, that the goods consigned belong to the consignee.—*Harrison and another v. Hirson and another*, 226.

4. The consignor of goods, in an action against the carrier for their loss, may introduce the bill of lading to prove the delivery of the goods, and may then show by parol testimony, that the goods belong to himself and not to the consignee.—*Ib.*

5. The rule of law, that the best evidence which the nature of the case admits of must be produced, applies, as well to secondary as to primary evidence.—*Coman and another v. The State*, 241.

6. The plaintiff's books of account in which he has charged the items for which he sues, are not admissible evidence to support his demand.—*De Camp and another v. Vandagriff*, 272.

FRAUDS, STATUTE OF.

1. Payment of the purchase money of real estate is not, of itself, a sufficient part performance to take a case out of the statute of frauds.—*Johnston v. Glancy and another*, 94.

2. The purchaser's entering into possession of the estate in pursuance of the contract, is sufficient to take the case out of the statute.—*Ib.*

3. But the mere continuance in possession of the premises, by a ten-

ant after his purchase, is not sufficient for that purpose.—*Ib.*

4. If a third person be induced to purchase the assignment of a note due from an intestate's estate, by the promise of the administrator that he shall be paid,—the promise is not within the statute of frauds, and the administrator is personally liable to the assignee.—*Hackleman v. Miller and another*, 322.

INDICTMENT.

An indictment concluding "against the peace of the state," may be so amended by the prosecuting attorney, with leave of the court, as to read "against the peace and dignity of the state."—*Cain v. The State*, 512.

INFANT.

If a minor, on the ground of his infancy, rescind a contract which had been fairly executed, and which was apparently to his advantage, he cannot afterwards sue for the money or property advanced, or labor performed, by him under such contract.—*Hearney v. Owen*, 337.

INTEREST.

The statute gives interest for money had and received, where the money is retained without the owner's knowledge, or where it is retained after it has been demanded. But interest is not recoverable, in other cases, on a count for money had and received.—*Hawkins v. Johnson*, 21.

JURY.

In an indictment for larceny, the jury have a right to determine the law as well as the facts of the case.—*Warren v. The State*, 150.

LEX LOCI.

1. The distribution of the personal property of an intestate, wherever it may be situated, is governed by the laws of the country of his domicile at

the time of his death.—*Irving v. M. Lean and another*, 52.

2. If a bond is void by the laws of the state where it was made, and where the court must presume (no other place being named,) it was to be performed, it cannot be enforced in Indiana.—*Titus v. Scantling and wife*, 89.

LIEN.

The vendor of real estate retains an equitable lien on the property for the purchase money, (unless he voluntarily divest himself of it,) against the vendee, and subsequent purchasers with notice.—*Deibler and another v. Barwick*, 339.

MORTGAGE.

1. Whether goods mortgaged to secure a debt, but which are suffered to remain with the mortgagor after the time limited for payment, and are used by him as his own, can be taken on the execution of a third person against the mortgagor, depends on the question whether the mortgage was executed to defraud the mortgagor's creditors, which is a question for the determination of a jury.—*Hankins and another v. Ingols*, 35.

2. The possession and use of the goods in such case, are *prima facie* evidence of fraud; but the presumption of fraud thus raised may be rebutted by testimony showing the transaction to be *bona fide*.—*Ib.*

3. The mortgagee of goods (the mortgage being silent on the subject) is entitled to their immediate possession.—*Case v. Winship*, 425.

4. Parol evidence is not admissible to show, that it was the understanding of the parties to such mortgage, at the time of its execution, that the mortgagor should retain possession of the goods until forfeiture.—*Ib.*

5. The assignment of a debt so secured carries the security with it.—*Blair v. Bass*, 539.

PATENT RIGHT.

1. The exclusive right of property in the invention of, or improvement on, any new and useful art, machine, &c. is the creature of statutory law, and must be strictly regulated by its provisions.—*Higgins v. Strong and another*, 182.

2. The assignment of a patent right is not valid, unless the assignment be recorded in the office of the secretary of state of the United States; and a note given to an assignee for such a right, whose assignment had not been so recorded, is invalid for the want of consideration.—*Ib.*

PRINCIPAL AND SURETY.

A prolongation of the time of payment, given by a creditor to his debtor without a new contract founded on a valid consideration, though given without the consent of the surety of the debtor, will not exonerate the surety from his liability.—*Coman and another v. The State*, 241.

RIOT.

Indictment against three persons for a riot. Plea, not guilty. Verdict of guilty as to one, and of not guilty as to the others. Held, that upon this verdict, a judgment could not be rendered against the defendant found guilty. Otherwise, if the indictment had been against the defendants together with others whose names were unknown.—*Turpin v. The State*, 72.

SALE OF GOODS.

A horse was purchased for eighty dollars, but neither the property nor possession was to pass until the purchaser had executed a note for the price. A note for only eight dollars was, by mistake, executed and delivered in pursuance of the contract. Held, that the property in the horse was not changed.—*Litterel v. St. John*, 326.

SLANDER.

1. An action of slander lies in Indiana for words spoken in another state, charging the plaintiff with being guilty of larceny.—*Offutt v. Earlywine*, 460.

2. If the defendant in such action plead in justification that the words are true, he cannot sustain his plea without proof, to the satisfaction of the jury, that the plaintiff was guilty of the offence charged.—*Ib.*

3. Words spoken in another state, actionable at common law, are actionable in Indiana.—*Linville v. Earlywine*, 469.

TRUST.

1. If A. purchase land with B's money, and take the conveyance in his own name, he holds the land in trust for B; and the land so held is liable for the debts of the *cestui que trust*.—*Blair v. Bass*, 539.

2. Such a trust may be established by parol testimony, even against the answer of the trustee. In such case, however, the bill must be supported not only by two witnesses, or by one witness and corroborating circumstances,

but the testimony must be clear, and should be received with great caution.—*Ib.*

WAGER.

If goods be won on a wager respecting the result of a presidential election, and be delivered to the winner, the loser cannot, either at common law or under our statute, sustain an action against the winner for the price of the goods.—*M Halton v. Bates and another*, 63.

WITNESS.

1. An Indian is not a competent witness under the statute of the state: but the supreme court cannot presume that a witness, admitted as competent in a circuit court, was an Indian, merely because he was the principal chief of an Indian nation.—*Harris v. Doe d. Barnett and another*, 369.

2. The maker of a promissory note is a competent witness for the plaintiff, in an action by the assignee against the assignor, involving the validity of the consideration of the note.—*Fosdick v. Starbuck*, 417.

INTELLIGENCE AND MISCELLANY.

ADVICE TO COMMIT SUICIDE, MURDER.

It is undoubtedly well settled, that if one counsel another to commit suicide, and the other by reason of the advice, kills himself, the adviser is guilty of murder. The law has a tender regard for human life, and will carefully scrutinize every case where a human being has been removed from the world in any manner than by the hand of God. Whatever may be thought of the policy of bringing an offence of this kind before a human tribunal, there can be no doubt, that, in numerous instances, suicides have been encouraged in their dreadful purpose, by the conduct of those about them; and when this conduct comes into such a form as to show a criminal intent, the law wisely regards it as a crime of great enormity. Accordingly, there have been several cases, where it has been necessary for the courts to act upon the principle above stated.

The first instance that we are aware of, in which this point came up, occurred in the reign of James I. "In that case a husband and wife being in extreme poverty and great distress of mind, were conversing together on their unfortunate condition, when the husband said, 'I am weary of life and will destroy myself,' upon which the wife replied, 'If you do I will too.' The man then went out, and having bought some poison, he mixed it with some drink, and they both partook of it. The draught was fatal to the husband, but the wife, in her agony from the effect of the poison, seized a flask of salad oil and drank it off, which caused a sickness of the stomach, and the consequence was that she voided the poison, and her life was saved. She was afterwards tried for the murder of her husband, and acquitted, but solely on the ground that being the wife of the deceased she was under his control: and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case pronounced her not guilty. There is also another case which occurred not very long since. (*Rex v. Dyson*, Russ. & Ry. C. C. R. 528, set out in Roscoe's Crim. Dig. 646.) It was the case of a man and woman who lived together, but were not married. They were in great poverty, and having formed a determination to destroy themselves, they went to the theatre, and afterwards proceeded together to Westminster-bridge where they got into a boat, but the water being shallow, they entered another, where they had conversed together for some time, when on a sudden, according to the statement of the man, he saw the woman struggling in the water, and plunged in for the purpose of rescuing her; but he failed in his attempt. The woman was drowned, and he was tried for her murder and convicted. The case was, however, subsequently referred to the judges, who were of opinion that the conviction was good in point of law; but as there was some doubt whether the woman might not have fallen into the water by accident, and whether the prisoner might not as he had stated, have endeavored to save her life, he had the benefit of the doubt, and was recommended for a pardon."

A case has recently occurred in England, (*Regina v. Alison*, 8 C. & P. 418), which presented some very extraordinary features. It was there held, that if two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law be guilty of the murder of the other who died. The prisoner was convicted. His confession, which was given in evidence on the trial, is as follows: "We both agreed to take poison. On Monday we talked about hanging ourselves, and on Tuesday night we agreed to take it, but we did not take it till the Wednesday night; it was about one fourth of an oz. of laudanum. I bought it at several places in Shoreditch; I bought forty drops at one place; I cannot say how many drops I got; I got about twenty drops at two or three places, and I got it in a small bottle, which I took three or four times; I had it three times full; I took altogether three quarters of a tea-cup full, and so did she; we both laid down on the bed together, it was about ten o'clock; in a about a quarter of an hour I felt very sick; at six o'clock yesterday morning she was awake and breathing; I woke again at nine o'clock; she felt cold, and I put my hand against her mouth; I lit a lucifer match, which I held over her mouth, but I could not see any breath come from her; I got up and went to my mother's down Whitecross Street, and did not know what to do; she told me not to go for a medical man; she was quite dead when she was cold; I had half a pint of ale at a beer shop in Whitecross Street; I do not know how long I was there, but I fell asleep: I went to mother's about five

o'clock in the afternoon; I suppose I was at the beer shop from the time I left home till I went to mother's; I locked the door when I went out; if I had sent for a medical man, I had no money to pay him; we were in very great distress at the time, having pawned the bed-clothes to support us; I had 300*l.* left me in May last, but I spent it in my support." "I was in very great distress, completely starving; I am fully innocent of giving her the poison; we wished to die in each other's arms; we broke off a small piece of bread, and laid down on the bed directly, and we both drank it together."

In the year 1816, in Northampton, Massachusetts, George Bowen was tried upon a charge of counselling one Jewett to commit suicide. "The evidence was, in substance, that Jewett had been convicted of the wilful murder of his father, and was sentenced to suffer death. The prisoner was confined in an apartment of the prison adjacent to that in which Jewett was, and in such a situation that they could freely converse together. The prisoner repeatedly and frequently advised and urged Jewett to destroy himself, and thus disappoint the sheriff, and the people who might assemble to see him executed: and in the night preceding the day fixed for his execution, he put an end to his life by suspending himself by a cord from the grate of the cell in which he was imprisoned. An inquisition was taken by the coroner's jury, who returned that he was a felon of himself."

It was thereupon contended by Attorney General Morton, that the prisoner was guilty of murder, and the court charged the jury that if they should find the facts as alledged in the indictment, they might safely pronounce the prisoner guilty of murder. The jury found the prisoner not guilty, probably, as the reporter suggests, (13 *Mass. R.* 361) from a doubt whether the advice given by him was, in any manner, the procuring cause of Jewett's death.

SCOTCH CRIMINAL PRACTICE.

Criminal proceedings are conducted with much more strictness in Scotland than in England. In the indictment, not only the specific offence charged, but the mode in which it was committed, must be set forth with scrupulous accuracy; the place where the crime was committed must be correctly described by its name, parish and county; all articles to be used in evidence must be minutely and accurately described, and submitted to the inspection of the prisoner, previous to his trial; and a list of witnesses must be annexed to the indictment, containing an accurate description of every witness, by his name, profession, place of residence, parish and county. The smallest error in these particulars, excludes the prosecutor from the benefit of that article, or witness, at the trial. A copy of the indictment must be delivered to the prisoner at least fifteen days before his trial and a list of the witnesses against him.

If a witness upon being called in court declares that his name, surname, profession, place of residence, vary in the slightest degree from the description contained in the indictment, it excludes his testimony on the trial. The witnesses are not examined in presence of each other. The moment the trial commences they are enclosed by themselves in a separate apartment. It is sufficient to cast a witness, if he has heard any part of the evidence given by any other witness, or has had any communication with the prosecutor subsequent to his citation.

The assize in Scotland consists of forty-five persons, summoned regularly

by rotation. The jury is selected from this list by ballot, each prisoner having a peremptory challenge to the extent of five. Prisoners are invariably furnished with counsel. If they are too poor to fee them themselves, they are assigned to them by the court, and this duty the barristers are not permitted to decline. If no barristers are present, the sheriffs of the counties, are named by the court to undertake that office. For many years Sir Walter Scott was regularly nominated to that duty at the Jedburgh Circuit; and the talents which have rivited the admiration of both hemispheres, were often gratuitously and successfully exerted, in defending the humblest and most destitute of Scottish prisoners.

The evidence being concluded on both sides, the jury are addressed by the counsel on both sides, the prisoner being in every case entitled to the last word. The prosecutor in Scotland never has the reply, but whether arguing legal points to the judge, or matters of evidence to the jury, he is obliged to allow his opponent to be last heard in defence.

Mr. Alison, who is our authority on this subject, in his work on the Practice of the Criminal Law of Scotland, says it is well known to all persons acquainted with that practice, that a great proportion, probably more than half, of the acquittals in the Scottish courts, originate in technical niceties, which are unknown in the English practice.

OBITUARY NOTICES.

Died in Lowell, Mass. ALBERT LOCKE, Esq. aged 33. He was graduated at Harvard University, in 1829; and commenced the practice of law in Lowell in 1835. In 1836 he was chosen clerk of the common council, the duties of which office he performed with great faithfulness and assiduity, up to the period of his last illness. Mr Locke was endowed with a combination of qualities, which won for him the good will and friendship of all who knew him. The uprightness of his professional life, the simplicity and sincerity of his mind, the uniform urbanity of his manners, had early acquired for him the respect and esteem of the entire community in the midst of which he lived; whilst his kind and affectionate temper, his cheerful and light hearted disposition, and his many other delightful social qualities endeared him, in no common degree, to his more intimate relatives and associates.

At North Cray, England, September 16, Mr LOWE, of Southampton buildings, the celebrated chancery solicitor. Mr Lowe had been for the last half century a practitioner in the court of chancery, in which department he displayed great skill and ability. He was possessed of many singular, and what most persons would have termed "crotchety" ways, but was nevertheless distinguished for unshaken integrity, and the most surprising assiduity and perseverance. To him the suitor is indebted for most of the improvements which have recently been effected in the court of chancery, the abuses of that court and the peculations of its officers having claimed his serious attention for many years. He was long a sharp thorn in the side of the late Lord Eldon, but amongst his brother practitioners had earned any thing but a good name. This, it is said, arose exclusively from the unsparing manner in which he dealt with their bills of costs when submitted to him for examination, a branch

of his duties in which he was eminently dexterous; his was the magic wand which

"Turned each six-and-eight-pence into nought."

It was seldom that a bill of costs escaped from his pruning knife except as a skeleton of what it had been. His own scale of charge was extremely moderate, but by means of a large business and incessant labor to the day of his death, he amassed a considerable fortune.

LONDON PRISONS FOR DEBT.

At the present period there are confined in the Queen's Bench prison somewhere about 120 persons, and a somewhat similar number in the Fleet prison, besides a few persons residing in the rules of both. In Whitecross street about 330, and nearly 100 on bail under the direction of the insolvent debtors' court. In Horsemonger lane 128, and in the Marshalsea 44. There are a few persons in the Borough Compter, a prison where persons are taken in execution from the Borough court of record and the Southwark court of requests, where they reside in certain parishes of the Borough. The Queen's Bench and Fleet present a cheering and melancholy appearance—cheering to the advocate for the abolition of debt, and melancholy from their deserted state; a desertion for the best. There were, in times past, about 800 in each prison, three or four persons in one room, including two *chums*, [lodgers], as they were termed; but, at the present period, those who are incarcerated can be accommodated with a sitting as well as a bed room! In Whitecross street prison there are more than in all the others, and for a very obvious reason; it is the sheriff's prison, for London and Middlesex, where all persons residing in the two jurisdictions are conveyed, when taken in execution, and as nearly the whole have it in their intention to avail themselves of the benefit of the Act, they do not procure their removal by a writ of *habeas corpus*. In the contemplated measure on the difficult and important law of debtor and creditor, it is expected that some means will be devised whereby a man will be enabled to stop himself in his business without the fear of a prison, or if he should be taken in execution, that he should, if he acts honestly, obtain his liberty in two or three days. Under the present system, if a person is provided with bail, he cannot be discharged until nearly a fortnight, no matter how expeditiously his proceedings may be prepared and filed in the insolvent debtors' court.

DEATH IN PRISON.

Those who have admired the pathetic description by Dickens of the death, witnessed by Mr Pickwick in the King's Bench prison, may read with interest the following matter of fact, from a Manchester paper: Mr Christopher Webster, who is well known from his connexion with the Imperial Bank, died very suddenly on Sunday afternoon last, in the New Bailey prison, where he had been committed by the commissioners under his bankruptcy. An inquest was

held upon the body on Monday, before Mr Rutter, the coroner, when Benjamin Grimshaw, a private watchman in the gaol, stated, that about 5 o'clock on Sunday afternoon he was standing near the hospital, when a prisoner named Horrocks called out to him. Witness went to him, and saw the deceased, who was sitting down, and his legs were crossed. Horrocks took him up, but as he could not walk, they carried him into the hospital, and witness immediately went to fetch Mr Ollier, the surgeon, whom he met on the New Bailey bridge. Witness had seen the deceased about an hour before walking in the green, and he then complained of a pain in his breast. Mr Ollier stated that he had almost daily opportunities of seeing the deceased ever since he was committed, as, being a debtor, he had privileges which others had not. He had not been under witness's care medicinally, but he had often said that he was broken-hearted, and that his disease was only in the mind. On Sunday afternoon witness was on his way to the prison when he met Grimshaw, and immediately went to the deceased in the hospital, and there found him in a dying state. He said, as he said before, that he was broken-hearted. He expired in about a quarter of an hour after witness got to him. Witness believed that his disease was an affection of the heart, produced by anxiety. The jury returned a verdict that the deceased "Died by the visitation of God."

TRYING TITLES IN HINDOSTAN.

According to the "Asiatic Researches," a very curious mode of trying titles to land is practiced in Hindostan: two holes are dug in the disputed spot, in each of which the plaintiff's and defendant's lawyers put one of their legs, and remain there until one of them is tired, or complains of being stung by the insects, in which case his client is defeated. Mr Crisp, from whom this is extracted, says, "in England it is the client, and not the lawyer, who puts his foot into it." *Quære*, whether the insects were of the order of legal sinecurists, which, in other places as well as in Hindostan, tire both lawyer and client.

LORD THURLOW'S RESIGNATION.

Sir John Sinclair, in his correspondence, says, that when it was resolved to deprive Lord Thurlow of the Seals, none of the ministers seemed willing to be the person to demand them, (which it was desirable should be done personally) from the ungracious reception which it was supposed he would meet with. At last Lord Melville was prevailed upon to undertake the task. He adopted the following for that purpose:—The evening before he sent a note to the Chancellor, informing him that he proposed having the honor of breakfasting with his Lordship next day, and that *he had some very particular business to settle with him*. On his coming next morning, Lord Thurlow said to him, 'I know the business on which you have come. You shall have the bag (purse) and seals. *There they are,*' pointing to a table on which he had placed them, 'and there is your breakfast,' of which they partook very sociably together. Lord Melville said that he never saw Lord Thurlow in better humor, and they parted apparently very good friends.

"THE GREAT LAND CASE."—At the last May term of the circuit court of the United States, in Portland, Maine, a decision was made by Mr Justice Story, which has excited much attention, from the supposition that it might affect many of the contracts entered into a few years since by those engaged in speculations in timber lands. It was the case of *Daniel v. Mitchell and others*; and in answer to numerous inquiries, we would announce, that we shall probably be able to publish it entire in an early number of our magazine. The learned judge had not an opportunity to reduce his opinion to writing on the circuit; and not having the papers with him, and in consequence of his numerous employments, he has not yet been able to prepare it for the press. One of the counsel in the case, the Hon. Charles S. Davis, has undertaken to make reduced abstracts of the bill and answers, and when this is done the opinion of the court will be given to the profession. We have taken the liberty of making this statement in answer to a great many inquiries respecting this matter, which have been directed to us by persons feeling a personal interest in the decision. We will also add, that there have been many exaggerated accounts of this decision; and those who have been led to suppose that it would afford a sort of panacea for all the troubles caused by the late inordinate land speculations, will be greatly disappointed. It is simply an application of old and well established principles to a state of facts in the cause at issue, and not likely to exist in a large majority of somewhat similar cases.

CONSPIRACY.—At the last October term of the municipal court for the city of Boston, eight individuals were tried on a charge of being members of an association called the Boston Journeymen Boot Maker's Society, the objects of which were charged to be illegal. The constitution of the society was offered in evidence, from which it appeared that the design of the society was to regulate and keep up the price of labor, &c., and to compel all journeymen boot makers to come under its regulations. The trial occupied more than a week, and able arguments were made by Rantoul and Kimball for the defendants, and by S. D. Parker for the commonwealth. Judge Thacher, in his charge to the jury, gave evidence that he had examined the law upon the subject with great care, and he explained the principles applicable to the facts proved, with more than his usual clearness and ability. He considered that the common law in relation to conspiracies was in force in Massachusetts sufficiently to render such associations illegal. The defendants were convicted. Exceptions were filed, and the case is to be argued before the supreme judicial court at the next March term. A report of the case is in preparation, and will be given to the public, either in the pages of our magazine, or as a separate publication.

MAINE LEGISLATURE.—The legislature of Maine, after a session of five weeks for the purpose of making a revision of the laws, adjourned on Thursday, 22d ult., having completed their task. The business of the session appears to have been conducted harmoniously, and at the close of the session, a vote of thanks to the speaker of the house, moved by Mr Ebenezer Everett, of Brunswick, one of the commissioners who reported the revised code, passed unanimously. This revision of the laws was committed by the legislature to three commissioners, who made a report at the last session of a revised code, in which the substance of all the laws previously enacted, and embraced in about a thousand chapters, was condensed into 178 chapters. This report was referred by the legislature to a joint committee of seven members from the Senate and seventeen from the House, to sit in the recess, and to report at an adjourned session. This committee sat 56 days, during which they revised the revision, made numerous alterations and amendments, and reported them to the legislature at their recent session. The legislature has now acted finally upon the subject, and ordered the new code to be published, under the direction of commissioners.

A MATTER OF COURSE.—When John Philpot Curran was master of the rolls in Ireland, and when appeals from his court to that of the chancellor were matter of daily occurrence, the following dialogue took place between Lord Manners, the then chancellor, and Mr Plunket, the present holder of the seals: Mr Plunkett: "My lord, I have humbly to move your lordship in the case of —." The chancellor: "Mr Plunket, I cannot hear any thing today but motions of course." Mr Plunkett: "My lord, I think you will find that this comes perfectly under your lordship's rule. It is merely to reverse an order made by his honor the master of the rolls." Loud shouts of laughter followed this bitter sally of the witty lawyer—the jest not being the less pungent that the statement was nearly literally true.

SUCCESS AT THE BAR.—Sir Egerton Brydges, in his autobiography, says, it is easy to explain theoretically what would seem to be the talents best fitted for the bar and the bench; but practically a number of accidental circumstances must concur to bring them into play. Some men have a right judgment and a knowledge of cases without the power of explaining themselves, and therefore cannot make their knowledge available. Others cannot obtrude themselves with sufficient firmness to make a commencement; and no one, till he has persevered a little while, can gain sufficient self-possession to display what he knows. He who will not be put down at first will gain the ear of the court at last, however bad his manner, if his knowledge be sound and his judgment good.

MONTHLY LIST OF INSOLVENTS.

<i>Insolvents.</i>	<i>Occupation.</i>	<i>Place of Business.</i>	<i>Warrant issued.</i>
Bartlett, George O.,	Bookseller,	Boston,	October 1.
Bixby, Luther,	Merchant,	Boston,	October 6.
[<i>Bixby, Valentine & Co.</i>]			
Berry, George E.,	Trader,	Salem,	October 29.
Bourasso,	Merchant,	Wareham,	Sept. 29.
Boyd, Amos H.,	Manufacturer,	Franklin,	October 1.
Coburn, Fitz H.,	Confectioner,	Boston,	October 3.
Cooper, Hiram,		Holliston,	October 1.
Dean, Ebenezer T.	Trader,	New Bedford,	October 27.
Green, Francis H.,	Baker,	New Bedford,	October 27.
Foster, John D.,	Trader,	Bradford,	October 2.
Fuller, Seth,	Bell hanger,	Boston,	October 23.
Guild, Charles,	Victualler,	Boston,	October 12.
Hovey, William, Jr.,	Housewright,	Cambridge,	October 26.
[<i>Hovey & Markham.</i>]			
Kendall, Samuel,	Clerk,	Boston,	October 20.
Markham, Larnard F.,	Housewright,	Cambridge,	October 26.
[<i>Hovey & Markham.</i>]			
Marsh, Peter,	Baker,	Hingham,	October 10.
Noyes, Samuel,	Merchant Tailor,	Cambridge,	October 9.
Patten, Joseph, Jr.,	Merchant,	Newburyport,	October 7.
Robbins, Freeman P.,	Shoe dealer,	Boston,	October 5.
Simonds, Samuel B.,	Merchant,	Lowell,	Sept. 30.
Stoddard, John L.,		Boston,	October 8.
Tarbell, William,	Yeoman,	Concord,	Sept. 10.
Tucker, James Jr.,	Merchant,	Dorchester,	October 22.

COLLECTANEA.

AN old dame, named Hannah Yeatman, annoyed by a keen cross examination in the court of queen's bench, became unruly, and exclaimed, "Don't you go for to ax me any kevestions, I'm not a going to be bothered in this way, I'm too hold!" Chief Justice Denman: "You must answer the questions, or I must commit you." Witness: "Commit your granny! You ought to be ashamed of yourself, you hought! The young 'oman as guv her hevvidence afore me war taken hout of the court 'alf dead, and all through you, sitting there so keviet in your big wig, and she in the asterisks. For shame!"—[Roars of laughter.]

The case of *Hooker v. New Haven and Northampton Co.*, recently tried in Connecticut, was an action to recover damages for injury to the plaintiff's land by water discharged from a waste pen of the defendants' canal. The defendants did not deny the injury, but claimed a right under their charter to let off all water necessary for the safety of the canal, without any liability for any damages whatever that might be done. Judge Sherman charged the jury to the effect that there is no redress for such injuries, where a corporation are in the discharge of their appropriate duties; and that if the canal company have done nothing not necessary for the safety and well being of the canal, they were not liable for any injuries whatever to the property of others, resulting from the acts in question. Verdict for the defendants.

The Cincinnati Gazette says: The superior court now in session in this city, has recently expressed the opinion—that where a bill of exchange is drawn in this State, upon a person in another State, whose residence is here, the holder of the bill cannot recover damages upon a protest, provided he knew the fact of residence when he took the bill; and that parol evidence is admissible to prove the knowledge.

In the year 1838, a man named Richard C. Gwatkins, committed murder at the White Sulphur Springs, Va., and after much trouble in fixing the venue, he was finally convicted of murder in the second degree. Not being satisfied, he obtained a new trial, and the second jury found him guilty of murder in the first degree.

At the assizes recently concluded, at Liverpool, there were 177 causes entered for trial. Of these, upwards of 70 were not defended. Including these, in 124 cases verdicts were rendered for plaintiffs. Five other cases were referred to be settled by arbitration; thirtyfive were withdrawn; four were struck out, and two were put off till next assizes. In five cases the defendants obtained verdicts.

A bold attempt was lately made, in Philadelphia, to corrupt Judge Barton. An individual was put upon trial for fraudulent insolvency, and before the proceedings commenced, the judge stated that he had received an anonymous letter, promising him the writer's political influence if he would charge the jury strongly against the defendant.

NEW PUBLICATIONS.

Practice of the Courts of King's Bench and Common Pleas in personal actions and ejectment. By William Tidd, Esq. Third American Edition With notes of recent English statutes and decisions. By Francis J. Troubat. Philadelphia.

A Treatise on the Law of Easements by C. J. Gale and T. D. Whateley, Barristers at Law. With American Notes, by E. Hammond. New York.

A Treatise on the Law of Fire Insurance and Insurance on Inland Waters. By Elisha Hammond. New York.